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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

NO. 72 - 86

CLARK SHERWOOD OIL FIELD CONTRACTORS, ET AL, *Petitioners,*

v.

IRENE HANKS SMITH, ET AL, *Respondents*

RESPONDENTS' RESPONSE AND OPPOSITION TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Opposition to "Jurisdiction"	1
Opposition to "Question Involved"	3
Statutes Involved	5
Opposition to "Statement of the Case"	6
Opposition to Petitioners' "Reasons for Granting Writ"	9
Certificate of Service	15

LIST OF AUTHORITIES

CASES

	Page
American Railroad Company of Porto Rico v. Birch, 32 S. Ct. 603, 224 U.S. 547	10
Atlantis Development Corp. v. United States, 379 F.2d 818	14
Farm Land Irrigation Co. v. Dopplmaier, 220 F.2d 249	14
Gaddy v. Louisville & Nashville Railroad Co., 386 F.2d 772	14
In Re Petition of Risdal and Anderson, Inc., 266 F.Supp. 157	10
In Re Petition of Sandra and Dennis Fishing Co., 209 F. Supp. 835	10
Lindgren v. United States, 50 S.Ct. 207, 281 U.S. 38	10
St. Louis, San Francisco & Texas Railway Co. v. Seale, 33 S.Ct. 651, 229 U.S. 156	10

STATUTES

Federal Rules of Civil Procedure:	
Rule 1	6
Rule 24	2, 4, 5, 7, 10, 12, 13, 14
Jones Act, 46 U.S.C.A. § 688	3, 13
Supreme Court Rule 19 (1) (b)	1
28 U.S.C.A., § 2072 (Act of June 19, 1934)	6, 13, 14

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To The Said Honorable Court:

Respondents, Irene Hanks Smith, and her four minor children (Intervenors in the District Court, and Appellants in the Fifth Circuit Court of Appeals) respond to and oppose Petitioners' Petition for Writ of Certiorari as follows:

OPPOSITION TO "JURISDICTION"

Jurisdictionally, Respondents assert, under *Supreme Court Rule 19 (1) (b)*, that the Court should not exercise

its discretion to review this case on petition for writ of error because this is *not* an instance:

> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Petitioner did not demonstrate otherwise. Further, there are no special or important reasons for granting a writ. Respondents believe this condition to be self evident and so no brief in opposition was submitted until after the Court's September 12, 1972, request therefor.

Petitioner cites no case in direct conflict with the decision of the Fifth Circuit Court of Appeals *on the same matter*—that is, where the record reflects a conflict of interest between the personal representative and a group of beneficiaries such that his representation of their interest is inadequate, and necessarily so, to the extent that these inadequately represented beneficiaries' interest can be protected adequately only by allowance of an intervention as a matter of right under *Rule 24, F.R.C.P. Rule 24(a), F.R.C.P.* states in its pertinent provisions:

> "Upon timely application *anyone shall be permitted to intervene* in an action: (2) when the applicant *claims an interest relating to the property or transaction which is the subject of the action* and

> he is so situated that the *disposition of the action may, as a practical matter, impair or impede his ability to protect that interest,* unless the applicant's interest is *adequately represented* by existing parties." (Emphasis ours).

The Court of Civil Appeals' decision in this case is in accord with comparable authority *on the same matter.* The suit in question was brought under *both* (a) the *Jones Act, 46 U.S.C.A., § 688, et seq., and* (b) under the general maritime law.

Not only is there no conflict of decisions demonstrated *on the same matter,* but the record is clear that the Court of Appeals has not here decided a "question of federal law, which has not been, but should be, settled by this Court"; has not "decided a federal question in conflict with applicable decisions of this Court"; and has not taken action that suggests a need for "supervision". The Supreme Court's established considerations governing review on certiorari have not been met, and no writ should accordingly be granted.

OPPOSITION TO "QUESTION INVOLVED"

Petitioners' recital of the question involved is rhetorical in characteristic, and, as with all of the petition, avoids the true issue of the personal representatives' inability adequately to represent the Respondents' interest in the subject matter in litigation because of the conflict of interest that necessarily exists in that the personal representative cannot further the interest of one beneficiary without necessarily acting to the detriment of the other beneficiaries. Petitioners avoid this issue, even though this is the very subject matter and basis of the Fifth Circuit Court of Appeals' decision in this case.

The real question before the appellate court was: When a seaman is killed in that capacity, and a suit for damages therefor is brought by a personal representative under the Jones Act *and* under the general maritime law, ostensibly for the benefit of all beneficiaries, where the personal representative, as a matter of record represents and furthers one beneficiaries' interest to the detriment and at least partial exclusion of the other beneficiaries' interest so that these latter beneficiaries are not *"adequately represented"* within the terms of *Rule 24 (a) (2), F.R.C.P.*, and have an "interest relating to the property or transaction which is the subject of the action", and "the disposition of the action may as a practical matter impair or impede . . . (their) ability to protect that interest", may such beneficiaries intervene in said cause to protect such inadequately represented interest as a matter of right, *Rule 24(a) (2), F.R.C.P.*, or alternatively, as a matter of discretion, *Rule 24(b), F.R.C.P.*, so that under such circumstances it is an abuse of discretion to refuse or deny intervention?[1]

Note too that although repeated references are made to "stipulations" and "agreements" between the personal representative and the Petitioners, those references do not relate to Respondents, who never "stipulated" or "agreed" to any of such matters. By refusing Respondents' intervention, the dead seaman's widow and their four children have been deprived of any forum in which to be heard.

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1. Mrs. Hanks and her four children challenged the paternity of the illegitimate child, Cheryl Ann Smith, and challenged the personal representative's attempt to settle the case for the inadequate sum of $50,000, and to settle same upon such terms whereby such amount would be distributed so as to give $21,000 thereof to the child whose paternity was in issue, while distributing, for example, but $6,000 to seven year old James Smith, whose paternity is not in issue, who is so mentally deficient as to require special training and care for probably all of his life.

STATUTES INVOLVED

Petitioners failed to list *Rule 24, F.R.C.P.*, which states:

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

"(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which interven-

tion is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the attorney general of the United States as provided in Title 28, U.S.C., § 2403."

The Rules promulgated by the Supreme Court "govern the procedure . . . in all suits of a civil nature." *Rule 1, F.R.C.P.* The Rules are promulgated under, and have the force and effect of law. See: *Act of June 19, 1934, U.S. C.A., Title 28, § 2072,* which, among other things states: "All laws in conflict with such Rules shall be of no further force or effect." Accordingly, these Rules are statutes involved in this proceeding.

OPPOSITION TO "STATEMENT OF THE CASE"

Because of misstatements and deletions the following is submitted:

The Respondent, Mrs. Irene Hanks Smith's husband, John B. Smith, died on or about April 11, 1967, while working as a member of the crew aboard a vessel in navigable waters owned, operated and controlled by Petitioners. Just after his death, one Rodney Smith, through his attorney, rushed into a Louisiana state court, secured his appointment as personal representative of the Estate of John B. Smith and filed this suit under the Jones Act and the general maritime law for such death, purportedly as a suit on behalf of Respondent, Irene H. Smith and the four minor children of the marriage of Irene H. Smith and John B. Smith, and additionally allegedly on behalf

of one Cheryl Ann Smith (not Irene H. Smith's child) contending that Cheryl Ann Smith was the illegitimate child of John B. Smith. Irene H. Smith had no notice of these activities at the time, but when she belatedly learned thereof she appeared, and because she was too late, unsuccessfully challenged the appointment of Rodney Smith in such capacity.

Meanwhile, the Texas courts appointed Irene H. Smith as representative of her husband's estate and she filed a Jones Act and general maritime law suit in Texas courts for the death of her husband. This suit is pending.

Subsequently, Irene H. Smith indirectly learned that Rodney Smith, his attorney, and the Petitioners, among one another were proposing to force a settlement and an entry of a judgment in the Louisiana case, (a) that would recognize the deceased's John B. Smith's paternity of Cheryl Ann Smith and give Cheryl Ann Smith $21,000 of their proposed $50,000 totally inadequate settlement; (b) that would inadequately give the widow but $12,000, and that would inadequately give their four minor children but $2,500 to Linda, $3,500 to John, $5,000 to Janell and $6,000 to James, her seven year old mentally deficient son who would require special training and care all of his life. Such a judgment in the Louisiana court would probably preclude Irene H. Smith's Texas suit. Obviously Rodney Smith and Petitioners were furthering the interests of Cheryl Ann Smith adversely and to the detriment and loss of the widow, Irene Smith and her four minor children.

In order to protect herself and her children, and their interests, from this threat, pursuant to *Rule 24, F.R.C.P.* she intervened in the Louisiana case asserting her and her

four children's interest in the subject matter thereof, and the inadequacy of Rodney Smith's representation. She there challenged Cheryl Ann Smith's paternity and interest,[2] the inadequacy of Rodney Smith's representation as the personal representative, the inadequacy and injustice of the proposed settlement and proposed distribution thereof, and sought appropriate damages and recovery for her children and herself.

Thereafter, in an effort to force their proposed settlement through, over and against Respondents' wishes and interests and in an effort to deprive Respondents of an opportunity to be heard on the matters raised, the Petitioners and Rodney Smith collectively tried to stipulate, and tried by hearsay affidavits to show the paternity of Cheryl Ann Smith, and fix damages and distribution thereof in accordance with their proposed settlement, and in this behalf they induced the Federal District Court to dismiss Respondents' intervention, and then enter their settlement as the judgment and findings of the court, thus depriving Irene H. Smith of any means, and of any forum, by which to be heard on the matters directly affecting the interests of herself and her four minor children. Respondent appealed to the Court of Appeals for the Fifth Circuit, where that Court correctly and properly ordered:

> "The district court's order dismissing the petition of intervention filed by Irene Smith is hereby reversed and the cause remanded with directions that Irene Smith be allowed to intervene on behalf of herself and as next friend for her four minor children. If she so desires Irene Smith is entitled to a jury determination on the question of whether Cheryl Ann

2. Mrs. Smith had testified by deposition that after their son James, she believed her husband could have no more children.

Smith is in fact the child of John Smith. In the event it is determined that Cheryl Ann Smith is a qualified beneficiary, Irene Smith must be afforded an opportunity to present evidence concerning the amount of support she and her children would have received if John Smith had lived.

"The district court's judgment approving the settlement agreement between Rodney Smith and the Defendants is reversed with directions that no agreement may be approved by the court unless Irene Smith is a party thereto.

"REVERSED AND REMANDED." (Appendix B, Page 28a, Petition for Writ of Error.)

OPPOSITION TO PETITIONERS' "REASONS FOR GRANTING WRIT"

Petitioners' argument singularly presupposes (a hypothesis contrary to fact) that no conflict of interest existed between the beneficiaries and that the personal representative could and would act in the interest of all of the beneficiaries. This ignores the record facts, and the basis for the appellate decision, that there did in fact exist between the beneficiaries (assuming that Cheryl Ann Smith is a beneficiary) such conflict that the personal representative was in the impossible situation that he could not act to the interest of one (Cheryl Ann Smith) without necessarily acting detrimentally to the interests of the others (Irene H. Smith and her four minor children), so that the personal representative's election to further the interests of Cheryl Ann Smith necessarily meant that he did so to the detriment and at least least partial exclusion of the interests of Irene H. Smith and her four minor children, and consequently could not and did not adequately represent this latter group of bene-

ficiaries. Not once do Petitioners in their petition for writ of certiorari truly join issue with the actual decision of the Fifth Circuit Court of Appeals on the real issue of inadequacy of representation which was the basis of the Fifth Circuit Court of Appeals' decision.

Every single case relied on by Petitioners involves conditions where there is no conflict of interest such that the personal representative's representation is inadequate. None of the cited cases involve *Rule 24(b), F.R.C.P.* None of the cited cases are in conflict with the decision of the Fifth Circuit Court of Appeals in the case at bar.

One case relied upon by Petitioners (*Civil v. Watermann*, 217 F.2d 94) approved a procedure that allowed antagonistic beneficiaries (as distinguished from conflict of interest) to appear as co-libelants, approving the procedure as one that caused no harm and had the advantage of having all interests clearly represented and taken care of in the trial of the case. The Supreme Court decisions cited by Petitioners (the *Birch case*, 1912, the *Seale case*, 1913, and the *Lindgren case*, 1930) are not comparable, are easily distinguished, and do not involve *Rule 24, F.R.C.P.*, and were not decided at a time when *Rule 24, F.R.C.P.* was law.

In Re Petition of Risdal and Anderson, Inc., 266 F. Supp. 157, the court allowed only the personal representative of the deceased to sue because, "there is *no conflict of interest* or ill-feeling between the child's representative and the administrator of the decedent's estate such as would warrant *an exception* to the rule." (Emphasis ours).

In *Petition of Sandra and Dennis Fishing Co.*, 209 F. Supp. 835, the court, considering an objection to th:

appearance of the minor daughter of a deceased seaman as not being the personal representative said:

> "The personal representative of Walter Wycherski is his second wife, who is not the mother of Judith Wycherski, and proctor for Judith Wycherski has represented to the court that there exists ill feeling and, conflict of interest between the personal representative and said Judith Wycherski. This representation has not been seriously challenged by the proctors for Petitioner.
>
> "I am persuaded that the reasoning of the Supreme Court in Czaplicki v. The Hoegh Silver Cloud, 351 U.S. 525, 531, 76 S.Ct. 946, 100 L.Ed. 1387, directs that in the situation here presented the claimant, Judith Wycherski, should be allowed to maintain her claim independently of the personal representative of decedent, on condition that the claim be presented through a next friend, since the language of the Supreme Court in no way removes the disability of a minor to sue."

Petitioners in their argument (Petition, page 9) urge that the power of the personal representative carries with it the power to stipulate and to bring suit to a conclusion by "compromise as he deems fit and proper in the interest of all" and thus recognizes the point that the representative must only act *in the interest, not adverse to the interest,* of the beneficiaries. When, as here, he advocates the interest of Cheryl Ann Smith to the detriment of John B. Smith's widow and their children, he has ceased to perform, or even be capable of performing (due to the conflict), his intended function. When he represents Cheryl Ann Smith to the detriment of John B. Smith's widow and their children, and misuses his efforts and offices to still their voice and to prevent them from being

heard, and to prevent their position and their rights from being litigated, how otherwise are the widow and these children to be heard and their rights and interest be advocated and litigated in a court of law, if not through the function and procedure of intervention pursuant to *Rule 24, F.R.C.P?*

The insidious aspects of this situation are best exemplified thus: (a) Cheryl Ann Smith at her best advocated position could only expect support, care, maintenance and contribution from her father until she became an adult, but Petitioners and Rodney Smith attempted to award her $21,000 of the attempted forced settlement; whereas (b) James Smith, only seven years of age at the time of his father's death, whose paternity is undisputed, who is mentally deficient and who will require special training and care for all of his life (not merely until adulthood), who by proof can expect and who is entitled by law to expect, the necessary support from his father during his life, was, under the Petitioners' and Rodney Smith's proposed forced settlement intended to receive only $6,000. The disparity is obvious. How in truth can James Smith's rights be protected under these circumstances and in this proceeding if not through the intervention procedure by those seeking truly to speak for him and to protect him and his interest in this litigation?

It is indelibly clear in this record that Petitioners and Rodney Smith and his attorneys simply designed and attempted to carry out a collective scheme to force settlement that would be beneficial to Cheryl Ann Smith, at the expense of little James Smith, his brothers and sisters and his mother, and to if possible foreclose them, still their voices, and prevent them from in any way being

heard in this proceeding. That the Federal District Court would support this scheme by conforming to these parties' collective bidding is truly astounding. Respondents have a right to be heard. The most fundamental aspect of constitutional procedural due process is the requirement that a party having interest in a matter in litigation have an *opportunity to be heard thereon.*

Rule 24, F.R.C.P., is specifically designed to handle this problem of conflicting interests and inadequate representation. The record reflects that the Federal District Court first recognized the need for intervention in this case, by originally allowing the intervention of Irene Hanks Smith and her four children. It is only when the district court sought to aid the Petitioners and Rodney Smith in forcing the settlement through, that he reversed his position and dismissed the intervention in order to facilitate the settlement and to cut off her right to be heard in the litigation. The Fifth Circuit Court of Appeals has correctly and properly remedied that utterly erroneous, unjust and unfair ruling of the district court.

The *Jones Act, 46 U.S.C.A., § 688, et seq.,* was enacted long prior to *28 U.S.C.A. § 2072,* the statute that gives the rules of procedure, the force and effect of law. Accordingly, when Congress enacted the provisions of *28 U.S.C.A., § 2072,* giving the Federal Rules of Civil Procedure the force of law, being subsequent to the *Jones Act,* the rules necessarily repeal the *Jones Act* to the extent that there may be a conflict between them. Accordingly, to the extent that *Rule 24, F.R.C.P.,* providing for intervention as a matter of right where there, as here, is inadequate representation appears to be in conflict with the *Jones Act's* requirement that suit be brought by a personal representative, the *Jones Act* is superseded and tem-

pered at least to the extent of such conflict. In other words, the *Jones Act's* "personal representative" requirement necessarily yields to the later Congressional enactment of *28 U.S.C.A., § 2072* to the extent of the conflict thus making the *Jones Act's* personal representative requirement subject to *Rule 24, F.R.C.P.* provisions for intervention where there is inadequate representation of parties having an interest in the subject matter in litigation. Again note the provisions of the *Act of June 19, 1934, U.S.C.A. Title 28, § 2072*, wherein it states:

> *"All laws in conflict with such rules shall be of no further force or effect."* (Emphasis ours.)

Note *Gaddy v. Louisville & Nashville Railroad Co.*, 386 F.2d 772, an FELA case involving the death of a railroad employee, wherein two women claimed to be the deceased employee's widow. One, Hazel Gaddy, had been appointed personal representative of the estate, and had filed suit. The deceased's original wife, Dorothy, filed a motion for leave to intervene contending that she was the widow of the deceased. Intervention was denied. The appellate court said:

> "It is our opinion that the district judge erred in not permitting Dorothy to intervene in the original trial and in determining the issue of the identity of the lawful widow after the jury returned the verdict.
> * * *
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> * * *
>
> "At the new trial, Mrs. Dorothy Marie Eusted Gaddy, will be permitted to intervene. Huber v. Baltimore & O. Railroad, 241 F.Supp. 646. The issue will be submitted as to which of the two women is the lawful widow of the decedent."

On this subject further see *Atlantis Development Corp. v. United States*, (Fifth Circuit, 1967) 379 F.2d 818; and *Farm Land Irrigation Company v. Dopplmaier* (Ninth Circuit, 1955), 220 F.2d 249.

Respondents respectfully submit that the judgment and decision of the United States Court of Appeals, Fifth Circuit, was correct, and that no grounds or reasons exist for the granting of Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been forwarded to Mr. W. Gerald Gaudet of Voorhies, Labbe, Fontenot, Leonard & McGlasson, 718 S. Buchanan Street, Lafayette, Louisiana 70501, and to Mr. James E. Diaz of Davidson, Meaux, Onebane & Donohoe, 201 West Main Street, Lafayette, Louisiana 70501, all attorneys for Petitioners, and to Mr. Bob F. Wright, Domengeaux and Wright, P. O. Box 3668, Lafayette, Louisiana, on this 2nd day of October, 1972.

JOHN GANO